Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petitions of SBC ILECs and	)	
VarTec Telecom, Inc. For	)	WC Docket No. 05-276
Declaratory Ruling Regarding	)	
The Application Of Access Charges	)	
To IP-Transported Calls	)	
	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Tamar E. Finn
Harry N. Malone
SWIDLER BERLIN LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel.)
(202) 424-7645 (Fax)

Counsel to Level 3 Communications, Inc.

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SUMMARY

In its Notice, the Commission requested comment regarding, among other things, SBC's request for a declaratory ruling that wholesale transmission providers that use Internet Protocol ("IP") to carry long distance calls that originate and terminate on the public switched telephone network ("PSTN") are "interexchange carriers" for purposes of Rule 69.5 and thus subject to access charges. Level 3 believes that the FCC has already decided this matter in the *AT&T Declaratory Ruling*. In view of that, SBC is overreaching with its broad-brush petition that advocates an approach that would make SBC the sole arbiter of whether access charges apply to a call. Level 3 is particularly concerned that the relief that SBC seeks will expose any carrier in the chain of transport to access charges, even those intermediate carriers that do not have a direct relationship with the access provider and may indeed not even be aware of the manner in which others have treated the traffic.

The Commission can better address SBC's request for relief by (1) clarifying that there is no situation in which a customer may use local exchange business services for the delivery of IP-in-the-middle long distance traffic to terminating LECs and (2) permitting LECs to amend their access tariffs to include provisions reclassifying fraudulent local exchange business service customers as access customers. At the same time that it provides this protection, however, the Commission should also emphasize that terminating ILECs can *not* look up the chain of cooperating carriers/providers to pick who is responsible for access charges. In particular, neither of the following two parties is liable for access charges: (1) a CLEC who cooperates to jointly provide access services to an IXC; or (2) an intermediate IXC who does not hand traffic directly to a terminating LEC(s).

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Level 3 Communications, Inc. ("Level 3"), by undersigned counsel and in response to the Commission's Public Notice released September 26, 2005,[1] offers its comments on the Petitions for Declaratory Ruling filed by the SBC ILECs and VarTec Telecom, Inc.

Level 3 notes that for the purposes of these comments, it uses phrases such as "interexchange" and "interexchange carrier" with the understanding that they reference *only* traditional PSTN-to-PSTN traffic and are used for ease of reference. The use of those terms as they might apply to IP transport should not be read to mean that Level 3 agrees that any exchange boundaries exist on an IP network or when a IP carrier provides transport services. Level 3 believes that the arbitrary boundaries established by local calling areas, exchange boundaries, LATAs, etc. remain one of largest impediments to the widescale overhaul of the regulatory regime for communications.

[1] *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276**,** Public Notice (Sept. 26, 2005).

I. THE COMMISSION SHOULD SINGLE OUT AND DISCOURAGE SELF-HELP EFFORTS BY LECS

Level 3 agrees that the network switching technology (*e.g.* circuit switched TDM vs. packet switched IP) is not the sole determinant when analyzing the status of the carrier and the jurisdiction of the traffic.[2] However, SBC assumes too much by characterizing the issue as a simple "IP-in-the-middle" dispute. The issue is more complicated than that, and technology-induced confusion regarding the nature of traffic it receives should not grant SBC or any LEC unilateral privileges to classify traffic. Specifically, SBC and other LECs may not unilaterally determine that traffic is long distance PSTN-to-PSTN and start billing access charges. If traffic is sent to a LEC over a non-access service (whether local exchange service or interconnection trunks), the LEC must employ established procedures to confirm that the traffic was improperly routed, and then that it is subject to access charges.

The genesis of SBC's Petition should concern the Commission. SBC's Petition is not an attempt to clarify an unsettled issue, but instead to enforce its legal interpretation through litigation. Rather than engage in the rulemaking process that VarTec initiated, SBC denigrated VarTec's Petition as "meritless,"[3] unilaterally applied the *AT&T Declaratory Ruling*[4] to intermediate carriers (even though the facts were different), and not only launched complaints for breach of contract, but went so far as to also allege fraud and civil conspiracy. After all that, it now finds itself at the Commission, where it should have started in the first place.

Such a heavy-handed practice, tantamount to self-help, is highly disruptive to the industry and a waste of resources. This approach is egregious given that many of SBC's purported

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[2] SBC Petition at 3.
[3] SBC Petition Exhibit F at 14.
[4] *Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004) ("*AT&T Declaratory Ruling*")

"customers" are not on notice that they may be subject to access charges. Contrary to SBC's claims, there is nothing in SBC's (or any other RBOCs') tariffs that would put an intermediate carrier on notice that it may be liable to SBC for access charges where it has no direct relationship with SBC. If SBC believes there is an applicable provision, it should provide the Commission with the exact tariff section and language.

Each of the RBOC's access tariffs contain provisions stating that the RBOC will "bill on a current basis all charges incurred by and credits due to the customer."[5] Under the terms of these tariffs, the ILEC bills a "customer." The term customer "denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which *subscribes* to the services offered under this tariff, including Interexchange Carriers (ICs) and End Users."[6] This is the full extent to which an access customer is described. The tariffs do not include an intermediate carrier in the definition of a "subscriber."

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[5] *See* Verizon Telephone Companies Tariff FCC No. 16 § 2.4.1(B); Pacific Bell Tariff F.C.C. No. 1 § 2.4.1(B); Qwest Corporation Access Service Tariff F.C.C. No. 1 § 2.4.1(B); BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1 § 2.4.1(B); and Ameritech Operating Companies Tariff F.C.C. No. 2 § 2.4.1(B). Southwestern Bell's tariff does not contain this exact language. In that tariff, the company notes that billing will be conducted based on jurisdictional basis when known, and otherwise, by the percentage of interstate use reports required to be *submitted by customers*. Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 2.4.

[6]This provision is found in the RBOC access service tariffs filed with the FCC at the following locations: Verizon Telephone Companies Tariff FCC No. 16 § 2.6; BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1 § 2.6; Ameritech Operating Companies Tariff F.C.C. No. 2 § 2.6; and Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 2.7. (Emphasis added.)

Pacific Bell adds the term "and collocators" to the end of the definition at Pacific Bell Tariff F.C.C. No. 1 § 2.6. "The term 'Collocator' refers to any individual, partnership, association, joint-stock company, trust corporation, or governmental entity or any other entity who provides fiber-optic facilities or microwave facilities for connection of its equipment, collocated in Telephone Company locations(s), to Telephone Company equipment and services." *Id.*

Qwest adds the term "and interconnectors" to the end of the definition at Qwest Corporation Access Service Tariff F.C.C. No. 1 § 2.6. "The term 'interconnector(s)' denotes any customer(s) who subscribes to Expanded Interconnection-Collocation (EIC) Service and who

The Commission requires that "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations,"[7] and any ambiguities are to be construed against the carrier.[8] Thus, for SBC to reinterpret unilaterally its tariff provisions to create a basis (where none otherwise exists) for imposing access charges on carriers that do not have a direct relationship with SBC is so unreasonable as to violate Section 201 of the Act.[9] Moreover, even if there arguably was any ambiguity in SBC's tariff, the issue should be escalated to the appropriate regulatory body for a determination. Specifically, if an ILEC contends that an intermediate carrier is an access customer, it should, at a minimum, file revisions to its tariff, where they can be placed on public notice, opposed, suspended (if appropriate) and resolved by informed parties in a public forum.

Better yet, LECs should wait until clearer guidelines are established by the Commission. Not every dispute over traffic jurisdiction is an *NTS* situation,[10] nor did the *AT&T Declaratory*

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provides fiber optic facilities to Company-designated locations for connection to EIC Service." *Id.*

[7] 47 C.F.R. § 61.2.

[8] *The Associated Press Request for Declaratory Ruling*, Memorandum Opinion and Order, 72 F.C.C. 2d 760, 764-65 (1979) (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, aff'd 29 FCC 1205 (1960)).

[9] Section 201(b) requires that the "charges, practices, classifications, and regulations" for communications services be just and reasonable. The Commission has determined that where a carrier attempts to enforce an unclear tariff provision against its customer, the tariff violates Section 201(b)'s just and reasonable requirements. *See* Halprin, Temple, Goodman & Sume v. MCI Telecomms. Corp., File No. E-98-40, Memorandum Opinion and Order, 13 FCC Rcd 22568 para. 13 (1998)("[W]e find that the Tariff does not clearly describe when MCI will charge Non-Subscriber rates to a line presubscribed to MCI. Accordingly, we conclude that the Tariff is neither clear nor explicit. On this basis, we find that the Tariff violates part 61.2 of the Commission's rules and section 201(b) of the Act.")

[10] SBC Petition at 10 n. 10. The issues in this proceeding, which turn on a question of legal interpretation, are easily differentiated from cases where a defendant has intentionally misrepresented the nature of its traffic. NTS pleaded guilty to fraud for intentionally routing its calls through equipment that stripped the calling party number information, after which NTS erroneously certified to SBC that intrastate calls were interstate in nature, thus avoiding higher intrastate access charges.

Ruling dispose of all the issues regarding IP-based transport. In its Petition, SBC attempts to anticipate and refute any assertion that the issue of classifying IP-enable services is unsettled.[11] However, contrary to SBC's portrayal of the *AT&T Declaratory Ruling* as all-encompassing, there are many unresolved issues before the Commission. For example, in addition to the issue in this proceeding as to whether wholesale transmission providers using IP technology to carry PSTN-PSTN long distance calls are liable for access charges, the Commission is seeking to determine:

- Whether the Commission should apply access charges to IP-enabled services at all, or impose intercarrier compensation obligations different from those paid by non-IP-enabled telecommunications service providers.[12]
- Whether certain characteristics of IP-enabled services, such as the irrelevance of geography, require different treatment for intercarrier compensation purposes.[13]
- Whether IP-originated traffic can be terminated over local trunks as local traffic.[14]
- The appropriate classification of Internet backbone traffic.[15]

Accordingly, to the extent that LECs like SBC believe that there are ambiguities in the access charge rules, they should use the above forums to advocate that the FCC adopt their interpretations and address their concerns.

[11] SBC Petition at 2.
[12] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 para. 62 (rel. Mar. 10, 2004).
[13] *Intercarrier Compensation Further NPRM; Developing a Unified Intercarrier*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33 para. 80 (rel. March 3, 2005).
[14] *Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-certification of IP-Originated VoIP Traffic,* WC 05-283 at 25 (filed Oct. 3, 2005).
[15] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 para. 15 (1998).

II. SBC HAS OVER-SIMPLIFIED THE ACCESS CHARGE PROBLEM AND OVERSTATED THE REMEDY, AT THE RISK OF VIOLATING EXISTING RULES AND UNDERMINING THE ESP EXEMPTION

A. Traditional Access Service

A traditional circuit-switched access service is arranged as depicted in this diagram:

End User → LEC → PICC'd Circuit-switched IXC → LEC → End User

This straightforward arrangement corresponds to SBC's Illustration 1. A single IXC carries a circuit switched call from the originating LEC to the terminating LEC and pays access charges to the respective LECs in accordance with Part 69 of the Commission's rules and the applicable LEC access tariffs. In this instance the originating caller has selected the carrier providing its interexchange service.

B. IP-In-The-Middle Access Service

Over the last few years, many IXCs have incorporated IP packet switching into their networks, in which PSTN voice traffic is routed through gateways which encode the voice signal into IP packets and route the traffic to its destination, where it is decoded and delivered to the local PSTN on the terminating end. This so-called "IP-in-the-middle" arrangement is as follows:

End User → LEC → IP Packet Network → LEC → End User
or Internet

Because their IP networks have used data protocols that were traditionally associated with enhanced services, some IXCs have characterized their IP-in-the-middle transport as an enhanced service and have accordingly sought to avoid access charges. However, as SBC has emphasized, the Commission has declared that calls that originate and terminate on the PSTN, but use IP in the middle, are subject to traditional access charges.[16] Consequently, the rules regarding this arrangement are settled.

C. Jointly Provided Access Service

Up to this point, Level 3 is in agreement with SBC. Unfortunately, SBC wants to overextend the application of the *AT&T Declaratory Ruling* so that any and all wholesale carriers of IP traffic are subject to access charges.

First, it is important to clarify which entities SBC proposes to sweep up in its dragnet. Specifically, the Commission should recognize and affirm that LECs that cooperate in providing exchange access to IXCs are not subject to access charges of any type. These arrangements are depicted in the following diagrams:

End User → LEC → Circuit switched IXC → LEC A → LEC B → End User

End User → LEC → IP Packet Network → LEC A → LEC B → End User
or Internet

These arrangements correspond to SBC's Illustration No. 2, although it is somewhat disingenuous that SBC has depicted the cooperating LEC in subscripted format, as if it is not a legitimate party to the exchange. In fact, this arrangement is routine service in which the two LECs cooperate to provide jointly provided switched access, in accordance with the meet-point billing provisions of their interconnection agreement and industry guidelines (*i.e.* MECAB). The parties cooperate to terminate traffic and bill the IXC for their respective elements of the termination service. Typically, the ILEC is in the role of LEC A, providing access tandem

[16] *AT&T Declaratory Ruling* para. 15.

services to LEC B when LEC B does not have the traffic volume to justify its own access tandem, but there is no rule that states that the roles cannot be reversed.

Contrary to what SBC has implied, there can be legitimate reasons for the non-ILEC to be the first point of local switching. For example, the non-ILEC may be a competitive access provider that offers access tandem services in price competition to the ILEC. Or, in the case of an IP-in-the-middle network, the non-ILEC may provide IP-to-PSTN gateway services that are not available from the ILEC, or are not competitively priced.

If LEC A has delivered traffic to LEC B over local trunks, and LEC B believes the traffic may have been mischaracterized, there are already remedies available. The interconnection agreement with the other LEC will invariably contain provisions for jointly provided switched access (*i.e.* “meet point billing”) in accordance with MECAB guidelines.[17] In the case where one party is skeptical about the reported jurisdiction of the traffic, there are provisions that permit that party to conduct an audit of the other party to verify those reports, with remedies available if the audit reveals misreported traffic.[18] If the parties still cannot agree, there are dispute resolution provisions that may be employed.[19] However, in the normal course of dealing, LEC A is never liable for access charges. The Commission reinforced this principle in the *AT&T Declaratory Ruling* when it noted that:

> pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and *not against any intermediate LECs* that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.[20]

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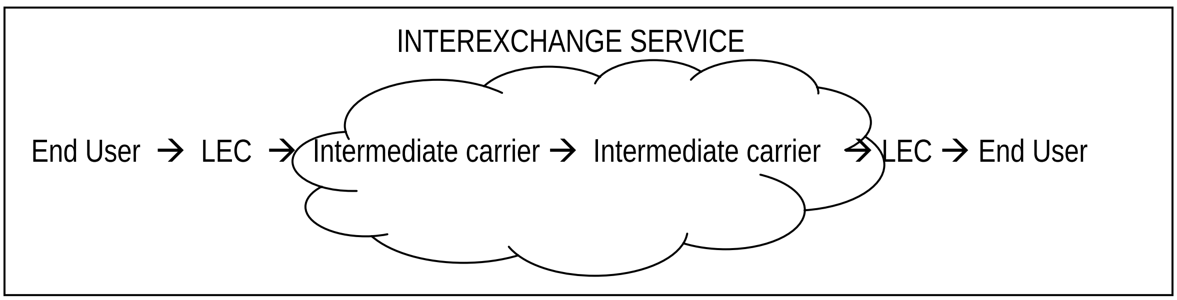
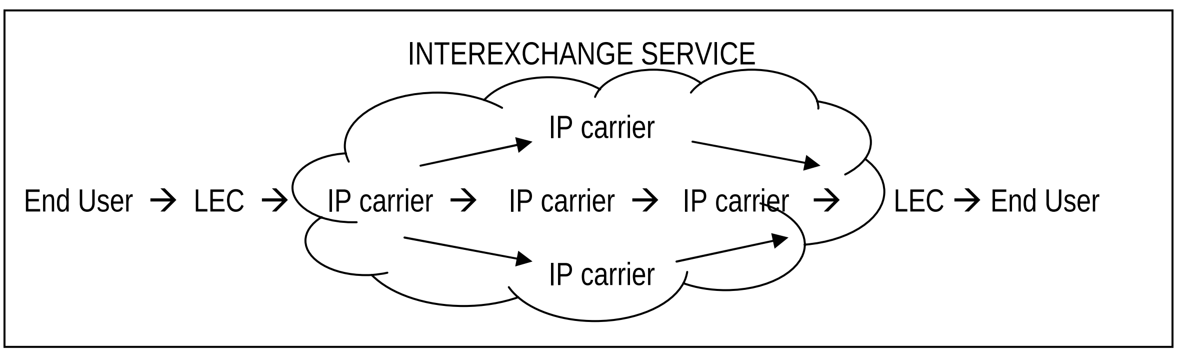
[17] *See, e.g.* SBC 13-STATE Agreement, Attachment Intercarrier Compensation, § 11, available at https://clec.sbc.com/clec/shell.cfm?section=115 (last viewed Nov. 8, 2005).
[18] *See, e.g. id.* § 14.2.1.
[19] *See, e.g.* SBC 13-STATE Agreement, General Terms and Conditions, § 12, available at https://clec.sbc.com/clec/shell.cfm?section=115 (last viewed Nov. 8, 2005).
[20] *AT&T Declaratory Ruling* n.92 (emphasis supplied).

To the extent that SBC asserts that it may declare LEC A to be an IXC, or otherwise impose access charges on LEC A, SBC is ignoring its interconnection agreements, industry guidelines and the Commission's rules.

D. Intermediate Carriers

The situation is slightly more complicated when more than one carrier cooperates to provide the transport service, rather than the local access service. Note that, as in the preceding arrangements, the transport service can be either circuit or packet switched (or both):





These diagrams correspond to SBC's Illustrations 3 and 4, respectively. An originating IXC typically uses intermediate carriers because it does not have end-to-end facilities necessary to route a particular call from the originating to terminating LEC. Intermediate carriers may also be used for the purposes of least cost routing of transport, but not for the nefarious purposes that

SBC ascribes to the practice.[21] Level 3 agrees with SBC that if the call should have been delivered using an access service, it makes no difference whether the party delivering the call holds itself out to be an IXC. If a competent authority determines that the end-to-end service is interexchange telecommunications subject to access charges, the last party delivering the call to the local exchange access provider(s) is the only party responsible for access charges. This principle holds regardless of the method in which this party interconnects to the local exchange.

A pertinent example concerns ESPs that subscribe to local exchange business services, typically primary rate interface ("PRI") trunks. To the extent that they are truly offering an enhanced service, the Commission regards them as end users and finds this permissible.[22] On the other hand, actual access traffic, including IP-in-the-middle, should be exchanged with the local PSTN via one of the access services offered for this purpose, specifically a switched access feature group service or local interconnection trunks if agreed to by the interconnecting parties or as decided in an arbitration pursuant to the Telecommunications Act of 1996. Level 3 suggests that the Commission could better address SBC's request for relief by (1) clarifying that there is no situation in which local exchange business services may be used for the delivery of PSTN-to-PSTN long distance traffic and (2) permitting LECs to amend their access tariffs to include

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[21] As a general matter, the FCC has endorsed the use of "least-cost routing" ("LCR"); *e.g.*, the practice of routing an interstate telecommunications call through different carriers for delivery to the ILEC. *See Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131 (2002) (dismissing Graphnet's claim that AT&T unlawfully routed traffic through other carriers to avoid high termination fees had it routed directly to Graphnet); *see also Fonorola Corporation Application for Authority Under Section 214 of the Communications Act to Resell Facilities of Other Common Carriers to Provide Domestic Carriers Interconnection with Canadian Carriers*, 9 FCC Rcd. 4066 (1994) (discussing international least-cost routing with specific emphasis on Canada). These FCC decisions concerning LCR have never contemplated shifting access charge responsibilities or other obligations or liabilities onto another carrier.

[22] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633, para. 17 (1988).

provisions reclassifying fraudulent local exchange business service customers as access customers.

At the same time that it provides this further protection, however, the Commission should also emphasize that terminating LEC(s) can *not* sift through the chain of carriers and pick who is responsible for access charges. Level 3 agrees with VarTec that LECs cannot impose liability on carriers who have not subscribed to the LEC's access services. In its Petition, VarTec argues that a carrier that has not subscribed to a LEC's access services in accordance with the ordering terms of the LEC access tariff is not a customer of the LEC and has no liability for access charges (or other intercarrier compensation), even if the terminating traffic transited that carrier's network at some instant.[23] Instead, the last non-LEC delivering IXC traffic is the access customer, and the access provider must seek compensation from that party.

In contrast, SBC appears to be asserting that both the last party delivering traffic to the terminating LEC(s) *and* the intermediate carrier are liable for SBC's access charges. While SBC does not argue in its Petition for such joint/vicarious liability, it did so in the Amended Complaint that is attached to the Petition.[24] Although VarTec was not the carrier that delivered traffic to SBC, it was a joint defendant in the Complaint, with SBC asserting that "the fact that VarTec hands off calls to Unipoint, Transcom, or other LCRs, which in turn may hand off traffic to other intermediaries in order to deliver it to plaintiffs for termination, is wholly immaterial to whether VarTec owes access charges on that traffic."[25] SBC based its claim against VarTec on "the same federal and state access tariffs that apply to all other ordinary interexchange voice traffic that interexchange carriers terminate with plaintiffs." However, SBC did not reference

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[23] VarTec Petition at 4.
[24] First Amended Complaint, Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc., No. 4:04-CV-1303CEJ (E.D. Mo. filed Dec. 17,2004), SBC Petition Ex. F.
[25] *Id.* at 14-15.

any authority that expressly or implicitly imposed an obligation on VarTec (who does not interconnect directly with SBC or a cooperating LEC that jointly provides terminating access service), to compensate SBC for the traffic that it terminates. As explained below, there is no such authority in SBC's tariff or FCC rules.

1. There Is No Tariff Authority

It is not surprising that SBC omitted this particular element in its allegation, since there is no provision in SBC's relevant tariffs or FCC rules that imposes this obligation on an intermediate carrier. Each of the RBOC's access tariffs contain provisions stating that the RBOC will "bill on a current basis all charges incurred by and credits due to the *customer*."[26] Under the terms of these tariffs, the ILEC bills a "customer." As VarTec notes in its Petition, the term "customer" in these tariffs "denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including Interexchange Carriers (ICs) and End Users."[27]

The Commission's access charge rules permit ILECs to charge IXCs for the use of the ILEC's facilities. Part 69 of the rules "establishes rules for access charges for interstate or foreign access services"[28] and provides that "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that *use* local exchange switching facilities for the provision of interstate or foreign telecommunications services.[29] The Commission has established similar rules for non-ILECs.[30] However, these rules apply only to those carriers that

[26] *See supra* note 8.
[27] *See supra* note 9.
[28] 47 C.F.R. § 69.1(a)
[29] 47 C.F.R. § 69.5(b)(emphasis added).
[30] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 9923 paras. 40-44 (2001).

directly utilize the ILECs' network facilities to originate and terminate traffic to LECs.

The rules do not impose any duty on a carrier that hands traffic off to another carrier for interexchange routing. "Access services" are defined as "services and facilities provided for the *origination* or *termination* of any interstate or foreign telecommunication."[31] Intermediate steps by which telecommunications may be routed after leaving the "origination" point, and before arriving at the "termination" point, are not governed by the access charge rules. Access charges are only imposed on the IXC that accepts originating interstate telecommunications traffic from a LEC or that exchanges interstate telecommunications traffic with the terminating LEC ("the delivering IXC"). As such, Commission rules do not permit SBC to seek access charges from intermediate IXCs such as VarTec.

2. Intermediate Carrier Liability Would Be Against Public Policy

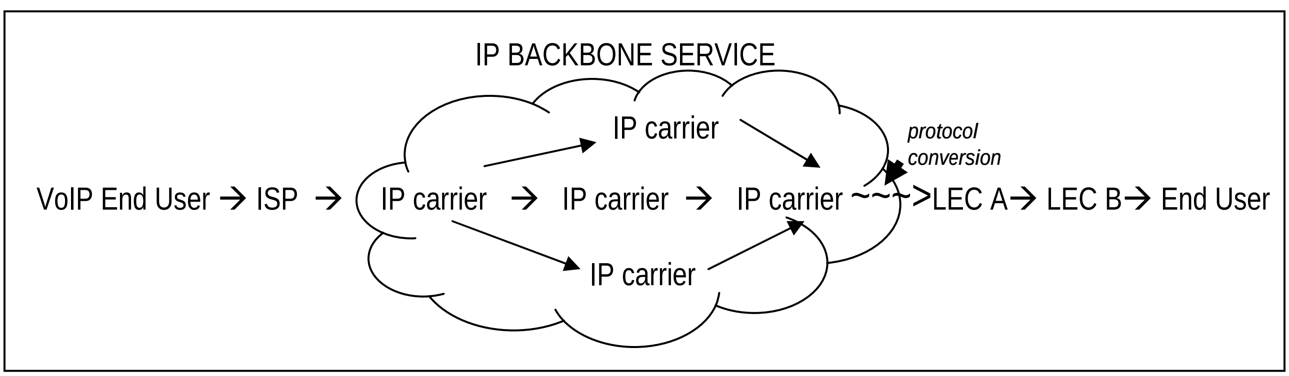
If the Commission were nevertheless to find that intermediate carriers could be liable for access charges, it would have a devastating affect on the development of IP-enabled services, especially VoIP, which rely on ad hoc peering and adaptive routing techniques. Unlike circuit-switched networks, IP networks do not rely on a fixed route for a single transaction. IP networks use a connectionless "adaptive" routing system, which means that a dedicated end-to-end channel need not be established for each communication.[32] IP networks convert all forms of information into indistinguishable data packets ("datagrams") that are routed dynamically between multiple points based on the most efficient route at any given moment.[33] Indeed, in an IP environment, the physical network "layer" does not distinguish between types of applications, and applications can be developed without changing the underlying transport mechanism. This

[31] 47 C.F.R. § 69.2(b) (emphasis added).
[32] William Stallings, Data and Computer Communications 585 – 591 (7th ed. 2003).
[33] *Id.* at 325 – 327.

means that even in a PSTN-to-PSTN, IP-in-the-middle application, the call may not traverse a predetermined route, may transit multiple intermediate carriers, and, thanks to seamless peering relationships, may even use *different combinations* of intermediate carriers during the same call. The advantages of this system would be seriously undermined by SBC's proposal. Among other problems, imposing access liability on intermediate IP carriers could disrupt peering relationships as IP backbone providers would be forced to take steps to protect themselves from this potentially broad and duplicative access charge liability.

III. ONLY PSTN-TO-PSTN LONG DISTANCE COMMUNICATIONS ARE IMPLICATED BY THIS PROCEEDING

Finally, the Commission should make clear that, regardless of the outcome of this proceeding, it applies only to situations where the long distance traffic originates as PSTN traffic and terminates as PSTN traffic, *i.e.* there is no protocol conversion. For example, it would not apply to the following arrangement:[34]



In this situation, a VoIP user connects directly to a broadband ISP, and the call travels an IP network before undergoing a protocol conversion and terminating to a PSTN end user. To

[34] The protocol conversion could be performed either by the IP carrier or the LEC providing terminating gateway service to the IP carrier.

date, with the exception of jurisdictional determinations,[35] the Commission has made no definitive regulatory determinations regarding VoIP services pending development of a record on the broad policy issues involved.[36] To the extent that the Commission feels the need to revisit this conclusion, this proceeding is not the place to do it. Instead, it should be addressed in the IP-Enabled or Intercarrier Compensation proceedings.

IV. CONCLUSION

It is appropriate for the Commission to take this opportunity to clarify the rules regarding compensation for some types of IXC traffic. In particular, Level 3 believes that the Commission should emphasize that PSTN-to-PSTN long distance traffic is subject to access charges, regardless of how it is carried, and that it must be terminated via LEC(s) access service offered for that purpose. By doing so, the FCC will bring clarity to an important part of the intercarrier compensation regime. On the other hand, this proceeding is not the place for the Commission to address any IP-enabled traffic that does not both originate and terminate on the PSTN.

In addition, the Commission should dictate that LECs cannot unilaterally resolve any questions regarding proper application of access charges simply by seeking judgments against all parties in the chain of traffic. For instance, the Commission should reiterate that, absent contractual arrangements to the contrary, one LEC may not impose access charges on another LEC who jointly provides access service for the termination of such PSTN-to-PSTN long distance traffic. Nor may a LEC ignore its tariff and seek out an intermediate carrier with "deep pockets" capable of paying access charges. Rules currently exist for resolving these issues, and

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[35] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004).

[36] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 para. 90 (1998) ("*Report to Congress*").

to the extent that there continue to be ambiguities, the Commission is in the process of refining these rules. Concerned LECs should use these forums to advocate adoption of their positions.

Respectfully submitted,

Tamar E. Finn
Harry N. Malone
SWIDLER BERLIN LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel.)
(202) 424-7645 (Fax)

Counsel to Level 3 Communications, Inc.

Dated: November 10, 2005